

IN THE HIGH COURT OF JUSTICE  
CO/8624/2005

CLAIM NO:

QUEEN'S BENCH DIVISION  
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

On the application of

ANDREW WOOD

Claimant

And

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

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CLAIMANT'S SKELETON ARGUMENT

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**Issues**

- 1) Were the following acts prima facie breaches of articles 8, 10 or 11 of the ECHR:
  - a) The taking of photographs of the Claimant on 27 April 2005 by an evidence gathering team of the Metropolitan Police.
  - b) The retention and use of images so captured after 27 April 2005.
  
- 2) If so, then were those prima facie breaches:
  - a) Authorised by law, and
  - b) Justified.
  
- 3) In taking and retaining photographs did the Defendant unlawfully discriminate against the Claimant for the purposes of Article 14 of the ECHR?

- 4) This case relates specifically to the events of 27 April 2005 but that was an instance only of the application of a practice adopted by the Defendant as to overt photography of protestors and the retention of images. Unlike other forms of surveillance<sup>1</sup> this practice is unregulated by statute.

### **Background facts**

- 5) At the time of the events giving rise to this application the Claimant was an employee of CAAT (Campaign Against Arms Trade). CAAT is an unincorporated association committed to campaigning against the arms trade by peaceful means. The Claimant has no convictions and has never been arrested as a result of his involvement in campaigning<sup>2</sup>. The Defendant does not allege any specific intelligence linking him to criminal activity.
- 6) The Claimant attended the Reed Elsevier (Reed) AGM on 27<sup>th</sup> April 2005. He had previously bought a share in the company. He attended with about 6 other people who were members of CAAT. He entered the meeting with one other person. The Claimant's purpose was to learn more about Reed's involvement with Spearhead Exhibitions Ltd (Spearhead), a subsidiary of Reed which runs the biannual Defence Systems Equipment International (DSEi) arms fair in London docklands, and to ask appropriate questions about Spearhead's activities.<sup>3</sup>
- 7) The Defendant's case is that they had been informed, before the AGM, by Reed that a number of members of CAAT had bought shares and that in the past CAAT protesters had attempted to disrupt meetings and had been involved in "unlawful

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<sup>1</sup> Such as covert surveillance pursuant to an authorisation under Part II of the Regulation of Investigatory Powers Act 2000 or photography at a police station or of people who have been subjected to certain powers such as stop and search (Police and Criminal Evidence Act 1984 s. 64 and 64B). The latter section was enacted after the Home Office Green Paper *Policing: Modernising Police Powers to Meet Community Needs (Aug 2004)* observed (para 6.12):

“there is no statutory power to take a photograph of a suspect – excluding surveillance situations – outside the police station. With the increasing use of interventions outside the police station, such as street bail and fixed penalty notices, **it is important that powers to take a visual image are clear**”.

<sup>2</sup> Claimant's Statement para 1 p. 33

<sup>3</sup> Claimant's Statement para 3, p. 33

activities".<sup>4</sup> The dates and details of these unlawful activities are not specified. The Defendant had also been informed that a person with a "history of involvement in unlawful demonstrations", known as EA, had been nominated as a proxy voter at the AGM.<sup>5</sup>

- 8) The Defendant decided to deploy two Forward Intelligence Trained teams (FIT) and one Evidence Gathering Team (EG). 1 Inspector, 3 sergeants and 21 constables were allocated to police the AGM. The EG comprised three officers and one photographer, and the two FIT teams were comprised of two and three officers respectively.<sup>6</sup>
- 9) The object of the deployment is said to have been that "should disorder result or offences subsequently come to light, those guilty of an offence could be identified so that they could be arrested...[and] that if those individuals who might attend and commit public order or other offences at the DSEi fair in September could be identified in advance... that would help to police the DSEi event".<sup>7</sup>
- 10) At the AGM two individuals (EA and RH) were ejected after chanting slogans. The Claimant asked a question which was answered by the directors<sup>8</sup>. The Defendant does not claim that there was any other disturbance or unlawful activity at or in connection with the meeting and nothing with which the Claimant was concerned.
- 11) The Claimant left the AGM with another employee of CAAT, Ian Prichard. They spoke to KB, another member of CAAT and while they were doing so "a tall well built police officer" got out of a car on the other side of the road and started to take photographs<sup>9</sup>. There is a dispute about how many images were taken. The Claimant's evidence is that the officer was taking photographs continuously.<sup>10</sup> The

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<sup>4</sup> AOS para 6; p. 124

<sup>5</sup> Statement of CI Weaver, para 6, pp. 138 – 139.

<sup>6</sup> Statement of CI Weaver, paras 9 and 12, pp. 139 – 140.

<sup>7</sup> Statement of CI Weaver, para 15, p. 140

<sup>8</sup> Claimant's statement para 7, p. 35

<sup>9</sup> Claimant's statement para 9, p. 35. In fact this appears to have been a civilian employee Mr Williams but he wore a uniform on that occasion to identify him as a member of a police team.

<sup>10</sup> P. 35.

Defendant says that only two photographs were taken of the Claimant but that a number of photographs were taken of IP who was with the Claimant.<sup>11</sup> The Claimant's case is that this was from at most 2 metres away.<sup>12</sup> The Defendant does not directly dispute this but claims only that the photographer "sought to keep a reasonable distance".<sup>13</sup> The photographer did not explain what he was doing or why. Neither the Claimant nor IP asked.

12) The reasons given by the Defendant for taking the photographs have changed over time. The AOS and statements now claim that the Claimant was seen talking to EA<sup>14</sup> and a direction was given to photograph him then. This account was not given in the Defendant's response to the pre-action protocol letter [p. 84] and the apparent justifications are examined in more detail below.

13) The Claimant started to walk away when he was being photographed. It is clear that he was then followed to the underground station but the Claimant's and the Defendant's accounts differ as to this.

14) The Claimant's case is that a police vehicle pulled up near them and that about 4 officers got out and stood near them. The Claimant believes that he was still being photographed at that time.<sup>15</sup> IP was asked for his identity and what he was doing at the AGM. He answered and the Claimant was then asked the same questions. He did not answer but said that he was "going about his lawful business".<sup>16</sup> IP and the Claimant were closely followed to the underground station by police who waited for a few minutes while they bought tickets.

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<sup>11</sup> AOS para 17; although the response to the letter before action refers to photographs having been taken on "a number of occasions" and the evidence of the photographer, Neil Williams, is that he took "several images" but he has only exhibited "those in which the Claimant appears either alone, or together with others... It can be seen that there are only two clear front-on images of the Claimant" (statement para 6, pp. 156 – 157).

<sup>12</sup> Claimant's statement, para 9, p. 35

<sup>13</sup> AOS para 17, p. 127; Neil Williams' evidence is that "I generally try to keep a safe distance from the subject and try not to invade their 'personal space'" (para 5, p. 156) and that "I believe I was on the opposite side of the road when I took the photographs" (para 7, p. 157).

<sup>14</sup> Statement of PS Dixon para 9, p. 144; statement of PC Hesketh, para 5, p. 148; statement of PC Palfrey, para 7, p. 153).

<sup>15</sup> Claimant's statement para 10, p. 36

<sup>16</sup> Claimant's statement, para 11, p. 36

- 15) The Defendant's account is that the Claimant and IP were asked by an officer in the EG team "politely" for their names, which IP gave and the Claimant did not. They were told they were free to go but the officer said he would like to ask about the AGM. They declined. The exchange is said to have been "amicable".<sup>17</sup>
- 16) The Defendant says that the Claimant and IP were then followed by two members of the FIT team to the station (not 4 as in the Claimant's case). These two officers had followed the Claimant and IP from Grosvenor Square and caught up with them while the EG team were still talking to them.<sup>18</sup> This is consistent with the Claimant's and IP's account that there were four officers, as well as the photographer.
- 17) The Defendant admits that after following the Claimant and IP to the tube station, a London Underground employee was asked to assist in identifying the Claimant by asking to see his travel card.<sup>19</sup>
- 18) Pages 162-8 are a selection of the photographs taken on this occasion. They are said to be those images where the "Claimant appears either alone or together with others who are the main subject of the photograph".

### **Subsequent use and retention of data**

- 19) The Defendant's evidence now explains the way that the photographs are processed and stored as follows:
- a) The original images are stored in RAW format and JPEG format and recorded onto three CD Roms. The Master CD Rom and a Working Copy are stored at the SCD4(3) Headquarters<sup>20</sup>. SCD is the specialist crime directorate of the Metropolitan Police. SCD4 is the forensic services department.

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<sup>17</sup> Statement of PS Dixon, para 11, p. 145.

<sup>18</sup> Statement of PC Hesketh, paras 7 – 10, p. 149

<sup>19</sup> Statement of PC Hesketh, para 10, p. 149.

<sup>20</sup> Statement of Neil Williams, para 13, p. 158

- b) The third CD is used to produce a JPEG copy, of which one copy is stored at SCD4(3) Headquarters and one copy is forwarded to CO11 at New Scotland Yard<sup>21</sup>. CO11 is the public order branch of the Metropolitan Police.
- c) There is no fixed point at which CD Roms of photographs stored at SCD4(3) Headquarters are destroyed;<sup>22</sup>
- d) The information stored at SCD4(3) does not identify the subject of the photographs and cannot be retrieved by name. It can only be accessed by the branch of MPS which originally requested the photographs, in this instance, CO11. They will be made available only if a civil claim is made against the police, or if they are believed to provide evidence relating to a specific offence;<sup>23</sup>
- e) The images forwarded to CO11 are reviewed after 12 months and are retained beyond that time if they have any ongoing significant intelligence value;<sup>24</sup>
- f) Access to the images stored at CO11 is restricted and monitored and other MPS staff can only have supervised access to them;<sup>25</sup>
- g) If it is thought that individuals who have been photographed are likely to attend a future event and commit offences, their photographs will be circulated to Officers attending that event, usually printed on a sheet with other photographs, but only with a code to identify the image and not the name of the individual. The sheets are destroyed after a given event.<sup>26</sup> The Defendant's evidence does not expressly confirm this but an example of the kind of sheet referred to is at 31.

20) Some processing of the images of the Claimant was carried out and he was identified in the photographs.<sup>27</sup> The evidence does not establish how this was done. The Defendant's case is that images of the Claimant would have been unlikely to have been retained after the DSEi exhibition in September 2005 if he had not brought this claim.<sup>28</sup> It is not known how his non-attendance at that event was

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<sup>21</sup> *Ibid*

<sup>22</sup> *Ibid*, para 15, p. 159

<sup>23</sup> *Ibid*, paras 16 – 17, pp. 159 – 160.

<sup>24</sup> Statement of Superintendent Gomm, para 12, p. 172.

<sup>25</sup> Statement of Superintendent Gomm, para 14, p. 173

<sup>26</sup> Statement of Superintendent Gomm, para 14, p. 173

<sup>27</sup> Acknowledgement of service, para 22

<sup>28</sup> Statement of Superintended Gomm, para 13, p. 173.

verified, nor is it known whether he was included on a sheet like that at 31 at the time of the DESi arms fair.

### **The Defendant's policy**

21) Similar action to that taken against the Claimant has been taken in relation to others involved in protest activity including arms-trade protesters and legal observers at demonstrations. The techniques used are described by Alex Gask in his statement at p. 41 – 42 (para 8-12) and typically involve the use of repeated close range photography that the participants find intimidating. The Defendant has a general policy on overt photography [pp 55 - 57] but this is subject to standard operating procedures that "must be read in conjunction with" it. Access to these procedures has been denied on the grounds that their disclosure would prejudice future police operations<sup>29</sup>. The Defendant's evidence is that the operating procedures they contain no additional guidance as to the circumstances in which overt photography will be used.<sup>30</sup> However, it is not clear whether it provides any further information about how images will be retained or used.

22) The purpose of the policy is described as being to allow the use of overt filming and photography "to prevent offences, reduce the fear of crime and reassure the public, gather evidence and intelligence, and identify offenders, whilst maintaining the support of the community". The policy states that overt filming/photograph "*may be used to record identifiable details of subjects suspected of being involved in crime or anti-social behaviour such as facial features, visible distinctive marks e.g., tattoos, jewellery, clothing and associates for the purposes of preventing and detecting crime and to assist in the investigation for all alleged offences*" [p. 56]. Additionally, it may be used to record officers' actions.

23) The policy additionally requires that filming and photography be used overtly by uniformed officers in marked vehicles, and that "When a pre-planned deployment is

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<sup>29</sup> Pp. 80 – 82

<sup>30</sup> Statement of Superintendent Gomm, p. 174.

authorized officers must be able to clearly state the reasons for the filming or photography and provide a copy of an explanatory leaflet" [p. 56].

## Article 8 ECHR

24) The Claimant's case is that there was a *prima facie* breach arising from:

- a) The circumstances and manner in which the photographs were taken and
- b) Their subsequent retention and use.

Further, neither interference was justified under Article 8(2) in that the interference was not in accordance with the law and, even if it was, was not proportionate to the aim pursued.

## Taking of the photographs

25) In granting permission, Sedley LJ observed: "*The ECHR decision in Von Hannover reinforces the submission that deliberately photographing an individual, albeit in a public place, is a prima facie invasion of their right to privacy, especially where it is the state that does it.*" [p.180].

26) Photography in a public place can involve a *prima facie* breach of Article 8 if the manner in which the photograph is taken (or other information is obtained) intrudes into the Claimant's "inner circle" (*Friedl v Austria* 23 EHRR 83 at para 49). In *Von Hannover*, the Court was mainly concerned with the publication of covertly obtained photographs. However, at paragraph 68 it also drew attention to the context in which they were taken:

"The Court finds another point to be of importance: even though, strictly speaking, the present application concerns only the publication of the photos and articles by various German magazines, the context in which these photos were taken – without the applicant's knowledge or consent – and the harassment endured by many public figures in their daily lives cannot be fully disregarded..."

27) Regard must also be had to whether the photographs relate to private or public matters and the use to which the material was intended to be put (*Von Hannover* at para 52), but these are indicators only and are not conclusive. The decision of the

Court in *Von Hannover* has extended the scope of the Article 8 concept of "privacy" in the public sphere,<sup>31</sup> such that it now includes such apparently "public" activities as "family holidays or expeditions...outings or games with one's children"<sup>32</sup>.

28) It is now accepted that the important question is not whether the occasion was a "public" or "private" one but as to how far the "zone of interaction" with others, which falls into the concept of private life, even when conducted in a public place, extends. In the case of "ordinary individuals", this private zone is greater in the public sphere than in the case of a "public figure" (*Sciacca v Italy* (2006) 43 EHRR 20). In every case, it is a question of fact and degree (*Murray (by his litigation friends Murray and another) v Express Newspapers plc and another* [2007] EWHC (Ch), Patten J).

29) In *PG and JH v United Kingdom* (App. No 44787/98), the Court explained the distinction in this way:

"There are a number of elements relevant to a consideration of whether a person's private life is concerned in measures effected outside a person's home or private premises. Since there are occasions when people knowingly or intentionally involve themselves in activities which are or may be recorded or reported in a public manner, a person's reasonable expectations as to privacy may be a significant, although not necessarily a conclusive, factor. A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (for example, a security guard viewing through closed-circuit television) is of a similar character. Private life considerations may arise, however, once any systematic or permanent record comes into existence of such material from the public domain." (para 57).

30) Case such as *Peck* and *PG* only go so far as to suggest that there is no breach resulting from ordinary observation or analogous, contemporaneous monitoring in a public place, this being the kind of activity that anybody venturing out in public accepts may happen. Part of the reason why the photographing of the applicant in *Friedl* did not involve a breach of Article 8 was that he was not identified in the photographs. In determining whether the taking of the Claimant's photograph

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<sup>31</sup> See the discussion by Eady J in *McKennitt v Ash* [2005] EWHC 3003 (QB), [2006] IP & T 605, [2006] EMLR 178, endorsed by the Court of Appeal at [2006] EWCA Civ 1714, and the discussion of that decision by Patten J in *Murray v Express Newspapers* (above).

<sup>32</sup> Per Patten J in *Murray* at para 45.

interfered with his Article 8(1) rights, it is necessary to consider the whole circumstances.

31) Where the taking of the image itself is intrusive then that in itself is also a relevant factor. The passage cited in *PG* (above) does not address this but the Convention has consistently recognized a right to freedom from interference with a person's physical and psychological integrity<sup>33</sup>.

32) The Claimant's article 8 complaint here must be seen in the context of the Defendant's whole course of conduct, including the taking of the photographs. Taken in this way the Defendant intruded far further into the Claimant's "inner circle" than was the case in *Friedl*. In particular:

- a) The Claimant was not incidentally included in a picture or captured by routine monitoring but was singled out as the specific object of police attention. This was emphasised rather than diminished by the fact that this happened in public and other people were not treated in the same way.
- b) At the time that the photographs were taken the Claimant was not participating in any public demonstration and nor was he reasonably suspected of having committed any criminal offence.
- c) The photograph was taken in circumstances where the Claimant reasonably feared that it would be used to identify him as a subject of particular concern to the police should he attend a similar event in the future. This fear has proved to be well founded.
- d) The manner in which the photographs were taken was intrusive and interfered with the Claimant's physical and psychological integrity.
  - i) Photographs were taken at close range.
  - ii) More than one photograph was taken. Although it is the Defendant's case that only two photographs were taken of the Claimant, it is admitted that numerous photographs were taken of his companion and the Claimant could not have known at the time how many photographs were directed at him. It is the effect on him at the time which is relevant in this context.

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<sup>33</sup> See e.g. the discussion in Moreham: The right to respect for Family Life in the European Convention on Human Rights: A re-examination [2008] EHRLR 44 at 49-51.

- iii) Several uniformed officers were involved. Precisely how many is a matter of dispute, but it is clear that at one point at least four officers were present, in addition to the photographer.<sup>34</sup>
  - e) No explanation was given to the Claimant as to why photographs were being taken of him. It was the Defendant's officers who had singled the Claimant out for attention and the responsibility lies on them to explain their conduct.<sup>35</sup>
  - f) The Claimant was followed by at least two officers to the underground station, a distance of about 400m.
  - g) The Claimant was asked to provide details of his identity and was asked about the event he had attended. Questioning with a view to establishing a person's identity may amount to an interference with Article 8(1) – *Freidl v Austria*. When the Claimant refused to give his name, attempts were made to obtain this covertly through the assistance of London Underground staff.
  - h) The purpose of taking the photographs was to identify the Claimant.
  - i) The photographs were taken with a view to their retention on a police database.
- 33) This goes far beyond the kind of incidental exposure to public gaze that everybody accepts when they go out in public. It is a significant intrusion calling for a justification.
- 34) The fact that the photographs were taken by police officers acting as agents of the state is also highly relevant to the question whether there was an interference with Article 8(1), as Sedley LJ observed in granting permission. It has been accepted that the photographing by the state without consent of individuals in custody *prima facie* interferes with Article 8(1).<sup>36</sup> The circumstances of the present case are more closely

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<sup>34</sup> Statement of PC Palfrey, paragraph 9, p. 153 and Statement of PS Dixon, para 11, p. 145.

<sup>35</sup> In particular, under the PACE Codes where a person is photographed under PACE s. 64A (see below), the officer is under a duty to inform the subject of the purpose of the photograph being taken and the purposes for which it may be disclosed, used or retained before taking the photograph (PACE Code D para 5.16). The Defendant's policy suggests that subjects should be given this information if they ask but that cannot be determinative against any obligation on the Defendant to volunteer the information.

<sup>36</sup> *Murray v United Kingdom* (1995) 19 EHRR 193 – photography of the applicant while detained in an army interrogation centre; *R v Loveridge (William)*; *R v Lee*; *R v Loveridge (Christine)* [2001] EWCA Crim 973 – filming of defendants in the Magistrates' Court.

analogous to such a situation than to the situation of, for example, photographs taken by press photographers of celebrities.

35) The Claimant also relies on the fact that the process of taking photographs is not monitored or subject to any specific independent regulation<sup>37</sup>. The decision is left to the individual discretion of officers. This is relevant to justification and whether the interference is in accordance with law but may also be relevant to the question whether there has been respect for an individual's private life.

36) In *R(Gillan) v Commissioner of Police for the Metropolis* [2006] UKHL 12, Lord Bingham considered at para 28 that a superficial search of the kind to which passengers uncomplainingly submit at airports may not reach the level of severity necessary to involve a breach of Article 8. That comment was obiter because the interference with Article 8(1) had been conceded. But the search in that case was for a limited purpose, subject to specific authorisation under statute and regulated by PACE codes of practice. The officer must give a clear explanation of the search and their name and an opportunity to retain a copy of the search. These safeguards are absent in this case. In addition the object of the photographs in this case was to create a systematic record.

37) In *X v United Kingdom* Application no. 5877/72, 12/10/1973, the Commission held that an application under Article 8 was manifestly ill-founded because the taking of photographs of the applicant after she had been arrested at an anti-apartheid demonstration at a rugby match did not engage Article 8(1). This was primarily because "the taking of her photographs was part of and solely related to her voluntarily public activities and does not therefore disclose any appearance of a violation of the rights and freedoms set out in the Convention". The Court's caselaw has moved on since this decision and now recognises, as set out above, that in certain circumstances the taking of photographs in public can involve a *prima facie* interference in Article 8(1). The Commission's reasoning is inconsistent with later decisions of the Court that the photographing of detainees against their will is a

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<sup>37</sup> Unlike other kinds of surveillance – see above.

*prima facie* interference with Article 8(1) (see above). Further, the present case is distinguishable on the facts in the following ways:

- a) The applicant in *X v UK* had been arrested before she was photographed: in *Perry v UK* (2004) 39 EHRR 3, the Court drew a distinction between the taking and use for identification purposes of photographs or video footage when those were obtained voluntarily or on the occasion of a previous arrest, and when the footage was obtained covertly and without consent, holding that the latter amounted to an interference in Article 8(1).
- b) The arrest took place in the course of a public demonstration involving the invasion of a rugby pitch by a large number of people.
- c) The applicant was told why the photographs were being taken at the time.

### **Subsequent retention and use: Article 8(1)**

38) The Defendant's retention, storage and subsequent use of the Claimant's photographs is a *prima facie* interference with the Claimant's Article 8(1) rights. In determining whether the Claimant's Article 8(1) rights have been interfered with it is relevant that the Claimant was not even suspected of committing any criminal offence.

#### *(i) The fact of retention*

39) The European Court has consistently held that the storing by a public authority of information relating to an individual's private life amounts to an interference with their Article 8(1) rights, regardless of whether that information is subsequently used in any way (see, for example, *Amann v Switzerland*, para 69). This is so even if the information that is stored is "public" in the sense that it was obtained in the public domain (*Rotaru v Romania*, App No 28341/95, judgment of 4 May 2000). In *Segersted-Wiberg v Sweden* (2007) 44 EHRR 2, the Court made clear that even though much of the information held in the files was in the public domain and originated from public sources such as newspaper articles:

"The Court, having regard to the scope of the notion of "private life" as interpreted in its case-law... finds that the information about the applicants that was stored on the Secret Police register and was released to them clearly constituted data pertaining to their "private life". Indeed, this embraces even those parts of the information that were public since the information had been systematically collected and stored in files held by the authorities. Accordingly, Article 8 § 1 of the Convention is applicable to the impugned storage of the information in question" (para 72).

40) The only exception to this rule is where the information that is held merely records the fact of a publicly known event, such as an arrest, and where there is no additional "surveillance or similar information in respect of the applicant or any subjective appreciations which he might have wished to refute" (*Kinnunen v Finland*, App. No. 24950/94).

41) In the present case, the retention of the Claimant's photographs falls within the category of personal information with additional surveillance and "subjective appreciations" for the following reasons:

- a) The Defendant processed the photographs to establish the Claimant's identity (although the evidence does not indicate how this was achieved);
- b) Although the Defendant asserts that the photographs are not identified by name but only by reference to the occasion on which they were taken, it is clear that there must be some connection at least to a record of the Claimant's identity otherwise there would be no purpose whatsoever in the Defendant retaining the photographs;
- c) In any event, the fact that the record shows that the photographs were taken as part of a CO11 operation connected to arms trade protests at least implies that the Claimant is an arms trade protestor in whom the police have reason to have an interest for public order reasons;
- d) The fact that the photographs were taken because the Claimant was allegedly seen speaking to EA must presumably be recorded somewhere; the fact that this was considered sufficient to establish a legitimate interest in the Claimant is the kind of "subjective appreciation which he might wish to refute" as was referred to in *Kinnunen*.

**42)**In *Marper* [2004] UKHL 39, [2004] 4 All ER 193, the retention of DNA profiles was held not to be a prima facie interference with article 8(1).<sup>38</sup> However:

- a) The limited use of the samples was crucial to the decision in that case (see especially paras 29 and 86 per Lords Steyn and Brown respectively). They were not subject to any active processing and could only be matched against DNA recovered in the future through expert analysis. The information could not be used to affect the way that the police or others dealt with the Claimants unless there was a positive match from another crime scene. Lord Brown thought that the only logical objection to the retention of DNA was “that it will serve to increase the risk of the person’s detection in the event of his offending in future”, which was plainly not a legitimate objection (para 86). This was closely analogous to the situation in *Kinnunen* (above).
  
- b) The position here is different. The Claimant has not been arrested or charged with any offence but the information nonetheless identifies him as an object of police concern in the future. There has been active processing of his photographs with a view to identifying the Claimant. This has involved the collation of other information held in relation to the Claimant: “the Defendant was subsequently able to ascertain the Claimant’s name and to match it to the photographs taken...” [AOS para 22]. The information held is comprehensible without expert input. It consists in photographs, together with some information linking the Claimant to protest activity.

*(ii) The subsequent use of the photographs*

43) The evidence as to the subsequent use of the photographs is that:

- a) The photographs would be kept at CO11 for as long as they retained some intelligence significance, which might only be on the basis that the Claimant

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<sup>38</sup> Baroness Hale dissented as to whether the storage of the DNA samples and profiles interfered with Art 8(1) but agreed that the interference was justified [paras 67 – 78]. *Marper*’s application to the European Court of Human Rights was heard by a Grand Chamber of the Court in February 2008. Judgment is pending.

- continued to exercise his right to peaceful political protest (for example, if he had attended the DSEi in September 2005);
- b) The photographs might be kept at SCD4(3) headquarters indefinitely and could be accessed there by CO11 officers if it is believed that they might be of assistance in the investigation into a criminal offence.
  - c) The photographs would be used by CO11 to prepare sheets of photographs of known protestors for the Defendant's officers in policing subsequent events.
- 44) The Defendant's evidence is that "Mr Wood did not appear to have attended [DSEi in September 2005]".<sup>39</sup> The only way that the Defendant could know that the Claimant did not attend DSEi is if it had used its photographs and any other intelligence retained in its files as part of its surveillance operations at the DSEi. This clearly demonstrates the use to which the files relating to the Claimant are used to monitor his activities.
- 45) The Claimant has been marked out as a potential public order risk. He will be the subject of police attention over and above that paid to the ordinary member of the public at any future protest activity in which he participates, regardless of whether such activity is entirely peaceful.
- 46) The European Court has recognized that Article 8 protects an individual's personal autonomy.<sup>40</sup> This includes the right to control when and by whom one's personal information is accessed – the right to "informational privacy".<sup>41</sup> By storing and using the Claimant's photograph for the purpose of singling him out as a subject of police interest, the Defendant has deprived the Claimant of control over his image and his personal autonomy.

### **Article 8(2): justification for interference**

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<sup>39</sup> Statement of Superintendent Gomm, para 13, p. 173.

<sup>40</sup> *Pretty v UK* (1998) 26 EHRR 241, para 32

<sup>41</sup> This concept was endorsed by Baroness Hale in her partly dissenting opinion in *Marper*, in which she held that the storage of DNA samples interfered with the individual's right to informational privacy protected by Art 8(1): Paras 68 – 78 at pp. 215 – 218.

## ***General approach to justification***

47) The burden lies on the Defendant to show:

- a) That the interference is in accordance with the law;
- b) That it meets a legitimate aim, and that
- c) The reasons adduced are relevant and sufficient, and proportionate to the legitimate aim to be pursued.

### ***(i) In accordance with the law***

48) "...the object of this requirement is to give protection against arbitrary interference by public authorities; that 'law' includes written and unwritten domestic law, but must be more than mere administrative practice; that the law must be accessible, foreseeable and compatible with the rule of law, giving an adequate indication of the circumstances in which a power may be exercised and thereby enabling members of the public to regulate their conduct and foresee the consequences of their actions; that the scope of any discretion conferred on the executive, which may not be unfettered, must be defined with such precision, appropriate to the subject matter, as to make clear the conditions in which a power may be exercised; and that there must be legal safeguards against abuse<sup>42</sup>."

49) There is no statutory authority for the Defendant's actions in taking, retaining or subsequently using the Claimant's photographs. In this respect the position is anomalous because photography of people in the Claimant's position is less regulated than for those who have been arrested. This is regulated by s. 64A Police and Criminal Evidence Act (PACE) 1984 and by PACE Code D paragraphs 5.12 – 5.17<sup>43</sup>. Photography deployed as part of covert surveillance operations is controlled by the Regulation of Investigatory Powers Act 2000 (RIPA). The Defendant relies on police officers' common law powers and duties to prevent and detect crime [AOS para 35 – 36].

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<sup>42</sup> *R (Gillan) v Metropolitan Police Commissioner and another* [2005] UKHL 12; [2006] 4 All ER 1041 at para 32

<sup>43</sup> Which also covers certain other person such as those required to wait by a community support officer or those issued with a fixed penalty notice.

50) The Defendant relies on its common law powers and has referred to *Marper* [*supra*] to suggest that this is sufficiently well-defined to be in accordance with the law. However, the power under examination in *Marper*, while widely drafted, was a specific statutory power which expressly provided both for the taking and for the retention of fingerprints and DNA samples. Where the Defendant relies on a power said to be implicit in a wider discretion, its ambit needs to be more clearly defined to meet the Convention requirements of accessibility and foreseeability (*Malone v United Kingdom*, para 67).

51) In *PG v UK* the Court considered the use of covert listening devices to record, for the purposes of voice analysis, the applicants' voices while they were being held in police cells and when charged. The Court noted:

"... the Government relied as the legal basis for the measure on the general powers of the police to store and gather evidence. While it may be permissible to rely on the implied powers of police officers to note evidence and collect and store exhibits for steps taken in the course of an investigation, it is trite law that specific statutory or other express legal authority is required for more invasive measures, whether searching private property or taking personal body samples... The underlying principle that domestic law should provide protection against arbitrariness and abuse in the use of covert surveillance techniques applies equally in that situation..." (para 62).

52) This related to covert surveillance but the same principles apply. The level of interference in this case is not something that arises necessarily by implication in the course of a specific investigation that is subject to detailed lawful control. In this case the entire legal basis for the interference is said to be a general power to prevent crime. This is an insufficient basis, even if it is supplemented by internal policies that do provide greater clarity since those policies are not law for these purposes (see e.g. *Silver v United Kingdom* (1983) 5 EHRR 347) and are subject to change at the option of the Defendant.

53) To the extent that the Defendant's own policies can be relied on to show that the procedure is in accordance with law the Defendant must have an accessible policy or

rules which set out with sufficient clarity the circumstances in which overt photography could be used, and the circumstances and conditions under which such photographs could be retained and used subsequently (see *Rotaru v Romania*, above, paras 56 – 61).

*The Defendant's Policy on Overt Filming and Photography*

**54)** The Defendant has a policy as to when overt filming and photography should be used but part (the standard operating procedure - SOP) has not been disclosed. The Defendant claims that the SOP adds nothing to the circumstances in which photographs are taken [p. 174] but it is not clear whether this is intended to cover the use and retention of images. If any relevant part of the policy is missing then the interference cannot be in accordance with law because requirement is that "any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied": *R (Munjaz) v Mersey care NHS Trust* [2005] 3 WLR 793 (HL) at para 34 per Lord Bingham.

55) But if the SOP adds nothing then the published policy is still inadequate:

- a) It does not define the circumstances in which overt filming and photography will be used by officers as a tool for the prevention and detection of crime;
- b) It makes no provision as to the manner in which photographs must be taken, the number of photographs of a given subject which may be taken, or the range at which photographs should be taken;
- c) It makes no provision for the circumstances in which officers must give information to the subjects of filming and photography as to the purpose of the filming/photography, providing only that officers must "be able" to give such information;
- d) It makes no provision for the subsequent retention, storage or use of photographs obtained through overt photography and in particular makes no provision for access to photographs by members of the public, for the

destruction of images after any given period, or restricting the uses to which they may be put.

**56)**As a result an individual cannot foresee the circumstances in which it is likely that his/her photographs will be taken, retained or used. The policy does not set out any safeguards to protect citizens from the arbitrary use of those powers, or to enable them to challenge the use of the power under domestic law principles.

57) In any event the Defendant has not followed its policy<sup>44</sup>:

a) The policy states that such photography may be used “to record identifiable details of subjects suspected of being involved in crime or anti social behaviour...and associates for the purposes of preventing and detecting crime and to assist in the investigation of alleged offences”. The Claimant has not been involved in crime. The limited (and disputed) evidence about a conversation with EA is far too tenuous to make him an “associate” of hers in relation to any criminal activity.

b) The policy also states:

“When a pre-planned deployment is authorised officers must be able to clearly state the reasons for the filming or photography and provide a copy of the explanatory leaflet. These contain details of the purpose of the filming and provide guidance on how members of the public may obtain further information and access to their images”.

c) The Defendant’s officers did not explain the reason why they were taking photographs of the Claimant or asking for his identity and no explanatory leaflet was given. As noted above, it is not fair to put the onus on the Claimant to seek an explanation in all the circumstances of this case.

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<sup>44</sup> Even if the legal framework is sufficiently certain, failure to follow it will mean that the interference is not in accordance with the law – *Perry v United Kingdom Application no. 63737/00* 17 Jul 2003 - at paras 48-9.

**58)** The Defendant suggests that any deficiency in the common law safeguards is met by the Data Protection Act 1998 (DPA). These are general provisions which take the Defendant's case on certainty no further. In any event:

- a)** The Defendant has not complied with the First Data Protection Principle which requires that data be processed fairly and lawfully. This requires *inter alia* that information be given about the purpose or purposes for which the data are being processed, and such further information as is necessary to make the processing fair.<sup>45</sup>
- b)** Where data is processed for the purposes of the prevention or detection of crime or the apprehension or prosecution of offenders, it is exempt from the first data protection principle to the extent that compliance with it would prejudice the purpose for which the data is processed (s. 29(1) DPA). There must be a "very significant and weighty chance of prejudice to the identified public interests" for the exemption to be relied on (*R (Lord) v SSHD* [2003] EWHC 2073).
- c)** There is no evidence that the purposes of the Defendant in taking the Claimant's photograph would have been prejudiced to any extent if the Defendant had given the Claimant the information required by the DPA at the time that his photograph was taken.
- d)** Additionally, the Defendant has not complied with the Fifth Data Protection Principle which requires that the data be kept for no longer than is necessary for the purpose for which it is processed. This overlaps with justification below.

### ***Legitimate aim***

59) It is accepted that the prevention of crime and disorder is a legitimate aim. But the Defendant's actions must be rationally and proportionately connected to that objective.

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<sup>45</sup> Part II, Sch 1 DPA 1998, para 2(2).

## ***Proportionality***

60) The assessment of proportionality must be made with due regard to the importance of the rights at stake and the justification for the interference in the Claimant's rights must be subjected to close scrutiny. This is a case where the interference with the Claimant's Article 8 rights has arisen in the context of the exercise of his article 10 and 11 rights and weighty justifications are required:

"The rights to freedom of expression and assembly and association, which are protected by articles 10 and 11 of the Convention respectively, are of the greatest importance to the proper functioning of any democracy. Any intrusion upon the rights, either by the developing common law or by the intervention of statute law, has to be jealously scrutinised" – *R (Laporte) v Chief Constable of Gloucestershire* [2005] QB 678 at para 35.

61) In order to meet the requirement of proportionality, the interference must be rationally connected to the stated aim and must be no more than is necessary to meet that aim.

**62)** The Defendant suggests that any interference with Article 8(1) was at a very low level and that the number of photographs taken and the manner in which they were taken were not excessive (para 42 of the AOS). However, this overlooks the context in which the photographs were taken (see above) and their subsequent use.

63) The Defendant's case is that the taking of the photographs, questioning of the Claimant to establish his identity, and subsequent retention and use of the photographs were necessary in the interests of the prevention of disorder or crime. However, any link with that objective was too tenuous to justify this level of interference.

64) The Defendant's AOS and witness evidence gives as a reason for photographing the Claimant that he was seen speaking to EA. Even if true (as to which see below) this is too tenuous a link, but it also seems to be the case that the Claimant would have been liable to be photographed in this way without this. This was the justification given in the response to the pre-action protocol letter at p. 86:

“it was therefore considered necessary to photograph and if possible identify those who had attended the AGM in order to protest in case they had either caused disruption in the past or else planned to do so in the future, and in particular at DSEi.”

65) This letter did not make any positive assertion about association with EA. In her statement Chief Inspector Weaver speaks about the gathering of information in general terms not related to specific association with identified individuals [p. 140 paras 13 and 15]. PS Dixon also says that the decision to take photographs of the Claimant and IP was not solely because of their association with EA but also in case any offence had been committed inside the hotel that was not yet apparent [143-4].

**66)** The Claimant and IP both deny speaking to EA [93 and 110]. PS Dixon says [144] that the Claimant and IP were speaking to KB and then they were joined by EA. This is his recollection and there is no contemporaneous record of this observation or who made it<sup>46</sup>. This, he says, was what prompted him to direct Mr Williams to take photographs. However, none of the photographs show the Claimant or IP with EA, despite the fact that one at least appears to have been taken outside the hotel where they are claimed to have been talking [162]. The woman in that photograph is KB, against whom no allegations are made. The Defendants may have confused KB with EA as suggested by Mr Prichard at 110.

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<sup>46</sup> None of the witnesses actually say that they saw them speaking. They say that they “were seen associating” or “were seen to speak to EA”. PC Palfrey says that “they spoke to EA” but it is not clear whether this is his own observation [153].

67) The evidence suggests that the claimed justification operates on 3 levels:

- a)** A general justification directed at gathering intelligence about people who attended the AGM in case they attended other similar events in the future and committed unlawful acts there. This is entirely speculative. There is no sensible basis for distinguishing the Claimant from anybody else in respect of whom the Defendant has no specific reason to believe they have committed or will commit an offence. This is not rationally connected to the prevention of crime and is disproportionate. The Defendant could not, and does not, suggest that a practice of routinely gathering and keeping photographs of members of the general public would be justifiable. The Claimant has been singled out for this action simply because of his attendance as a peaceful protester at the Reed AGM. Monitoring by the state of an individual on the sole basis of his/her peaceful expression of their political views is inherently objectionable in a modern democracy and is an interference with their privacy under Article 8(1).
  
- b)** An alleged link with EA. This is disputed and does not in reality distinguish the Claimant from any other member of the public. EA's actions are not particularised and the only link with the Claimant is limited and contested observation of an alleged conversation. All the other information available about the Claimant was that he was committed to the peaceful objectives of CAAT. The practical reality is that many people who attend demonstrations may find themselves being spoken to in these kind of circumstances. To use that as a basis for identifying them would be to single them out on the ground of the exercise of their Article 10 or 11 rights. Whether or not this amounts to discrimination it obliges the court to engage in the kind of jealous scrutiny referred to in *R (Laporte) v Chief Constable of Gloucestershire* [2005] QB 678 at para 35.

c) The need to identify perpetrators in case an offence was committed inside the AGM that only becomes apparent later. This too is speculative. It is improbable given the level of security at the AGM (see the second statement of the Claimant). In any event it could not justify any use or retention after the AGM once it was clear that no such offences had taken place. There would then be no need to record the images on CDs or retain them.

68) The above points apply to the capture and retention and use of images. They apply with particular force to the practice of giving copies of the photographs to officers attending similar events in the future [see page 31]. This places the Claimant at particular risk (above). The AOS suggests that this will happen only where there is "a potential need to identify persons involved in unlawful protests who may have participated in similar past events" [para 25]. It is not explained how this technique will advance this aim. If the individuals engage in unlawful conduct on the second occasion then that can justify police action against them then. The fact that they may have attended a previous peaceful protest is irrelevant. It is particularly significant that, had the Claimant attended the DSEi in September 2005, even if he had not engaged in any unlawful activity there, the Defendant would have retained the Claimant's images as it would have considered that they still had "significant intelligence value". The Claimant's involvement in peaceful protest activity does not provide a relevant and sufficient reason for the retention and use of his image.

## **Articles 10 and 11**

### ***Interference***

**69)** The Claimant's participation in protests against the arms trade and his attendance at the Reed AGM self-evidently involved the exercise by him of his right to freedom of expression and to peaceful assembly, protected by Articles 10 and 11 ECHR. The Defendant appears not to dispute this, but suggests that he did not interfere with the Claimant's exercise of those rights.

**70)**Where the Defendant's actions have a chilling effect on the exercise of rights under Articles 10 and 11, that is an interference in those rights which must be justified: *Steel & Others v United Kingdom* 28 EHRR 603.

71)The Defendant's account differs materially from that put forward by the Claimant in his own case. However:

- a)** Even on the Defendant's account the events still amount to an interference in that they tend to inhibit the exercise of the Claimant's Article 10 and 11 rights. The Claimant had committed and is alleged to have committed no offence. He had attended a meeting in the course of a lawful protest against the arms trade. The right to peaceful political protest is highly regarded under the ECHR and entitled to particular protection. This is relevant to justification but the authorities also have a positive obligation to afford a proper opportunity of expression to political ideas advocated through peaceful means "through the exercise of the right to assembly as well as by any other lawful means"<sup>47</sup>
- b)** The Defendant underestimates the intimidatory impact on such a person of being photographed, questioned and followed for a substantial distance by a number of uniformed police officers. His evidence on this is clear that he found the incident upsetting, felt threatened and uncomfortable while being photographed and questioned [p. 36] and was shaken and frightened [p. 37]. He is also anxious that an unknown amount of information, over which he has no control, has been retained by the Defendant and may be passed on to others or used against his interests.

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<sup>47</sup> *Izmir Savaş Karşıtları Derneği v Turkey* App No 46257/99 (judgment available in French only). Quotation taken from Registrar's Press Release.

c) The Claimant's evidence does not stand alone. The tactics used on this occasion have also been deployed in other cases. Specific examples are given in the statement of Alex Gask at pp 41 – 42. The action on this occasion forms part of a pattern where photographs are taken at close range, sometimes using flash. The effect is that "this caused those present to feel intimidated and as if they were doing something wrong". This evidence, and the effect on the protesters has not been disputed by the Defendant.

72) It is not necessary for the Claimant to show that his conduct has actually been affected by the process of taking photographs and the retention of information as long as it is liable to have that effect. In *Segerstedt-Wiberg* (above), the ECtHR held at para 107:

"The Court, for its part, considers that the applicants' complaints under Articles 10 and 11, as submitted, relate essentially to the adverse effects on their political freedoms caused by the storage of information on them in the Secret Police register. However, the applicants have not adduced specific information enabling it to assess how such registration in the concrete circumstances could have hindered the exercise of their rights under Articles 10 and 11. Nevertheless, the Court considers that the storage of personal data related to political opinion, affiliations and activities that is deemed unjustified for the purposes of Article 8 § 2 *ipso facto* constitutes an unjustified interference with the rights protected by Articles 10 and 11..."

**73)** This passage refers to the retention of information that is "unjustified" under Article 8(2) but that is not an essential ingredient in whether or not there is a prima facie interference with rights protected by Articles 10 or 11. It is obviously relevant to justification<sup>48</sup> but knowledge of the existence of information on the secret police register will tend to have an inhibiting effect on the exercise of those rights whether or not the retention of that information is justified in Article 8 terms. In this case, the effect is amplified by the Defendant's evidence that it would probably have retained the Claimant's photographs for longer if he had subsequently attended DSEi.

### ***Justification***

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<sup>48</sup> On facts such as those in *Segerstedt-Wiberg* (and in this case) the threshold for justification under Articles 10 and 11 is likely to be higher than that under Article 8 (for reasons given below). It follows that retention that is not justified under Article 8 will not be justified under Article 10 or 11.

**74)**Where, as here, the interference involves an interference with the Claimant's rights of political free speech or freedom of association protected under Articles 10 and 11, then the reasons for the interference must be "convincingly established"<sup>49</sup>. Political free speech "is a freedom of the very highest importance in any country which lays claim to being a democracy. Restrictions on the freedom need to be examined rigorously by all concerned, not least the courts"<sup>50</sup>. This is particularly the case where (as here) the restrictions in issue will tend to have an impact beyond the individual case and are likely to have a chilling effect, inhibiting the exercise of the rights by others:

"The most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern"

*Bladet Tromso and Stenaas v Norway* (2000) 29 EHRR 125, para 64.

**75)**The fact that the Claimant was a member of a small campaigning group rather than the press does not affect the extent of protection to be afforded to his rights to free expression (*Steel v UK*, para 89).

**76)** The same arguments as to justification as are set out in relation to Article 8 apply in relation to Articles 10 and 11.

#### Article 14

**77)**In order for Article 14 to apply the discrimination alleged must be within the ambit of one of the other convention rights. A tenuous connection is not enough but otherwise there is no "brightline" distinction between what is within the ambit and what is not (*Secretary of State v M* [2006] UKHL 11 per Lord Brightman at para 60). The measures complained of must be "linked to the exercise of the right" (ibid para 59).

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<sup>49</sup> *Autotronic AG v Switzerland* 12 EHRR 585 at para 61 (Article 10) and *Öllinger v Austria*, App No 76900/01, 29 June 2006, para 36 (Article 11). Thus an interference could in theory be justified under Article 8 but not under Article 10 or 11 where the threshold is higher. This does not follow in this case because on analysis the reasons offered by the Defendant are insufficient in any case.

<sup>50</sup> *Pro-life Alliance* [2004] 1 AC 185 at para 8.

78) The facts here are linked to the exercise of the Claimant's Article 10 and 11 rights because the photography complained of occurred in the course of and as a result of the exercise by him of those rights. They are within the ambit of his Article 8 rights because Article 8 embraces personal details such as a person's name or their image. Even if there has been no interference with those rights the taking and retention of that data falls within Article 14.

79) The Defendant was in an analogous situation with others with whom he compares himself. This is a typical case where this question merges with the alleged reason for and justification for the discriminatory treatment (see the observations of Baroness Hale in *Ghaidan v Godin Mendoza* [2004] 2 AC 557 at para 134 commenting on *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617).

80) The Claimant is alleged not to be in an analogous group with either members of the public or others who attended the AGM because he was is said to have "been seen associating with a group which included individuals with a history of criminal acts committed in the course of protests" [AOS para 48]. This only takes the Claimant out of the same group as his comparators if it is assumed that the Claimant himself has a propensity to criminal activity because he is also engaged in protest. It is an assumption based on his political beliefs and so is prohibited by Article 14. The same point can be made about very many protesters whose activities are entirely lawful and where there is no reason to believe they will ever commit an offence. The alleged association is insufficient to distinguish the Claimant from members of the public generally or to justify the action taken against him.

### ***Relief sought***

81) The Claimant seeks:

- a) An order that any photographs taken of him on 27 April 2005 and any photographic records of him be destroyed, in whatever form and wherever they are currently stored;

- b) A declaration that the Defendant's actions in taking photographs of him and seeking to establish his identity on 27 April 2005 have violated the Claimant's human rights;
- c) A declaration that the Defendant's policy of overt photography of those who are involved in political protests or demonstrations but who are not reasonably suspected of any criminal offence is unlawful;

MARTIN WESTGATE

April 30, 2008